FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary

DATE: January 14, 2002

SUBJECT: Statement Of Reasons for MUR 4994

Attached is a copy of the Statement Of Reasons for MUR 4994 signed by Chairman David M. Mason, Commissioner Bradley A. Smith, and Commissioner Darryl R. Wold.

This was received in the Commission Secretary's Office on Friday, January 11, 2002 at 3:44 p.m.

cc: Vincent J. Convery, Jr.
OGC Docket
Information Division
Press Office
Public Disclosure

Attachment

22.04.405.3812

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
New York Senate 2000 and	)	**MUR 4994**
Andrew Grossman, as treasurer, *et al.*	)	

STATEMENT OF REASONS

On September 25, 2001, the Commission met in Executive Session to consider the First General Counsel's Report, dated September 11, 2001, in MUR 4994. First, by a vote of 2-4, the Commission did not approve a motion to adopt the recommendation of the Acting General Counsel ("AGC") to find reason to believe several party committees and candidate committees violated the coordinated expenditure limits and related provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, but to take no further action and close the file.[1] Then, by a vote of 5-1, Commissioner Thomas dissenting, the Commission affirmatively rejected the Acting General Counsel's recommendation to make those same reason to believe findings.[2] The Commission unanimously approved the AGC's

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[1] Commissioners Thomas and McDonald voted for the motion, and Commissioners Mason, Sandstrom, Smith, and Wold voted against.

[2] Specifically, the Commission rejected recommendations that it find reason to believe that:

- the New York State Democratic Committee and David Alpert, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a), 441a(f), and 441b(a), and 11 C.F.R. § 102.5;
- Hillary Rodham Clinton for U.S. Senate Committee, Inc. and William J. Cunningham, III, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f) and 441b(a);
- the Democratic Senatorial Campaign Committee and James M. Jordan, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f), 441a(h), and 441b(a), and 11 C.F.R. § 102.5;
- the Michigan Democratic State Central Committee/Federal Account and Roger Winkleman, as treasurer, violated 2 U.S.C §§ 434(b), 441a(a), and 441a(f), and 11 C.F.R. § 102.5;
- Stabenow for U.S. Senate and Angela M. Autera, as treasurer, violated 2 U.S.C.
- §§ 434(b) and 441a(f);
- the Missouri Republican State Committee and Harvey M. Tettlebaum, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a), 441a(f), and 441b(a), and 11 C.F.R. § 102.5;
- Ashcroft 2000 and Garrett M. Lott, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f) and 441b(a); and
- the National Republican Senatorial Committee and Stan Huckaby, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f), 441a(h), and 441b(a), and 11 C.F.R. § 102.5.

recommendation that it find no reason to believe a number of other respondents had violated any provision of the Act in connection with this matter.[3] Finally, given the preceding votes, the Commission voted unanimously to take no action with respect to all remaining respondents (i.e., those not the subject of the "no reason to believe" findings) and close the file. This Statement of Reasons explains, in part, why the undersigned voted to dispose of the case in this manner. *See Democratic Congressional Campaign Comm. v. FEC,* 831 F.2d 1131, 1135 (D.C. Cir. 1987) (Statement of Reasons necessary where dismissal is contrary to General Counsel's recommendation); *Common Cause v. FEC,* 676 F. Supp. 286, 291 (D.D.C. 1986) (same). Commissioner Karl J. Sandstrom issued a Statement of Reasons in connection with this matter on December 18, 2001; Commissioner Scott E. Thomas issued his Statement of Reasons on December 19, 2001; Commissioners Darryl R. Wold, Bradley A. Smith and David M. Mason are issuing additional Statements of Reasons to explain their votes.[4]

The AGC concluded that certain television advertisements, which were paid for by state and/or national party committees, may have been coordinated with the parties' nominees for United States Senator, or their authorized committees. She also interpreted the advertisements as being "for the purpose of influencing" or "in connection with," the candidates' election campaigns. *See* 2 U.S.C. §§ 431(8)(A)(i), 441a(d), 441b(a). In her view,

> [i]f such coordination did take place, the expenditures for the . . . party communications would have become coordinated party expenditures subject to the limitations and prohibitions of 2 U.S.C. §§ 441a(a), 441a(d), and 441b. Moreover, the . . . parties would have been required to pay for the advertisements entirely with federal funds, pursuant to 11 C.F.R. § 102.5.

MUR 4994, First General Counsel's Report at 4. Accordingly, the AGC recommended that the Commission find reason to believe and begin an investigation. *Id.* at 53-54.

Since mid-1999, the Commission has considered a number of enforcement matters that, with variations in the underlying fact patterns, presented essentially the same legal issue. *E.g.,* MURs 4378 (National Republican Senatorial Committee, Montanans for Rehberg, et al.); 4553 and

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By a vote of 4-2, Commissioners Thomas and McDonald dissenting, the Commission also rejected the AGC's recommendation that it approve the appropriate factual and legal analyses.

This Statement refers to the "Acting General Counsel's" recommendations because the former AGC or her designee signed the report; the current General Counsel appeared at the Commission's Executive Session.

[3] These were Rudolph Giuliani; the Friends of Giuliani Exploratory Committee and John H. Gross, as treasurer; the Giuliani Victory Committee and D. Jan McBride, as treasurer; the Santorum Victory Committee and D. Jan McBride, as treasurer; and New York Democratic Victory 2000 and Andrew Tobias, as treasurer.

[4] Commissioner Bradley A. Smith agrees that the prosecutorial discretion basis laid out in this statement is sufficient to reject the reason-to-believe recommendations, but would have rejected the recommendations for the additional reason that none of these advertisements contained express advocacy and that he views the Constitution and the Act as requiring express advocacy for communications to be deemed coordinated expenditures. *See* Commissioner Bradley A. Smith, Statement for the Record in MUR 4624 dated Nov. 6, 2001 (addressing, for individuals and groups other than political committees, bases for requiring an express advocacy content standard in regulating expenditures for general public communications coordinated with a candidate).

4671 (Republican National Committee, Dole for President, *et al.*); 4713 (Democratic National Committee, Clinton-Gore '96 Primary Committee, *et al.*); 4507 and 4544 (Democratic National Committee, Clinton-Gore '96 Primary Committee, *et al.*); and 4476 (Wyoming Democratic State Central Committee, Karpan for Congress *et al.*). In all of these matters, the Commission either did not find reason to believe or did not find probable cause to believe that respondents violated the Act, or, in the instance of pre-1996 advertisements in the Dole and Clinton matters, found no reason to believe that respondents violated the Act. *See also* MUR 4503 (South Dakota Democratic Party, Tim Johnson for South Dakota, *et al.*) where the Commission pursued the party committee involved only with respect to certain communications, not others.

As reflected in the divergent views set forth by Commissioners regarding those previous cases, there has been considerable disagreement surrounding this area of the law and about the application of the law to particular facts. Proceeding in this case at this time would be unfair to the respondents because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against them but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances.

Judicial actions have complicated the Commission's efforts to enforce 2 U.S.C. § 441a(d). In *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996), the Supreme Court found the Commission's presumption of coordination between party committees and candidates to be unconstitutional, and remanded for further proceedings the issue whether any limitation on coordination between a political party and its candidates was constitutional. Following that decision, the Commission postponed completion of a pending rulemaking on party-candidate coordination. In light of the Court's recent decision in *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001), which upheld the constitutionality of the coordinated expenditure limits of 2 U.S.C. § 441a(d), we intend to proceed with that rulemaking to provide additional guidance concerning party-candidate coordination.[5] Notwithstanding the Commission's intention to enforce the limits of 2 U.S.C. § 441a(d) with respect to future elections, the Commission declined to hold respondents in this MUR, who were engaged in political speech, subject to an investigation and possible civil penalties. In view of the foregoing, our votes reflect an exercise of prosecutorial discretion and a decision that an investigation and exposure to possible civil penalties were inappropriate. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

In addition, as to the Michigan Democratic State Central Committee/Federal Account, Stabenow for U.S. Senate, the Missouri Republican State Committee,[6] and Ashcroft 2000 and their respective treasurers, we conclude that reason-to-believe findings were inappropriate

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[5] While Commissioner Wold agrees that the Commission can promulgate rules to specify in detail the Commission's intended application of the statutory provisions of 2 U.S.C. § 431, subdivisions (17) and (18), and § 441a, subdivision (a)(7)(B)(i), defining coordination, and that such rules could be helpful, Commissioner Wold believes that those statutory provisions can be applied on their own, without such rulemaking, at least as to those instances of coordination that clearly fall within the statutory language.

[6] The registered name of this committee is Missouri Republican State Committee-Federal Committee.

because these entities were not properly respondents to the complaint. These four political committees were not itemized in the complainant's list of respondents (*compare* AGC's proposed Factual and Legal Analyses for these four committees, First General Counsel's Report in MUR 4994 dated Sept. 11, 2001 ("FGC"), Att. 4 at 1, Att. 5 at 1, Att. 6 at 1, Att. 7 at 1 (asserting that with respect to these respondents, the matter was generated based on information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities) *with* AGC's proposed Factual and Legal Analysis for Hillary Rodham Clinton for U.S. Senate Committee, FGC, Att. 2 at 1 (stating that the matter was generated by a complaint filed with the Commission)). Nowhere in the complaint were these entities identified as respondents. *See* 11 C.F.R. § 111.4(d)(1) (complaint "should clearly identify as a respondent each person or entity who is alleged to have committed a violation"). In addition, these four committees were not notified of the complaint pursuant to 2 U.S.C. § 437g(a)(1) ("Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed [] a violation"). *See* Letters from General Counsel Lawrence H. Norton to Treasurers of Michigan Democratic State Central Committee/Federal Account, Stabenow for U.S. Senate, the Missouri Republican State Committee, and Ashcroft 2000 of 10/17/01 at 1 (after the case was closed, letters informing these committees for the first time that the Commission had considered allegations against them). In fact, these entities were merely mentioned in the complaint's narrative, which fails to lay out any cognizable theory under which these purported respondents could be held to have violated the Act.[7] Furthermore, while the National Republican Senatorial Committee ("NRSC") was properly identified as a respondent in the complaint, allegations regarding its activities in association with the Friends of Giuliani Exploratory Committee were properly dismissed on the recommendation of the AGC. Because the reason-to-believe recommendations as to the NRSC made by the AGC were based solely on its alleged association with the Missouri Republican State Committee and Ashcroft 2000, the reason-to-believe recommendations as to the NRSC were properly rejected along with the recommendations as to the Ashcroft and Missouri Committees.

January 11, 2002

David M. Mason
Chairman

Darryl R. Wold
Commissioner

Bradley A. Smith
Commissioner

[7] *See* Commissioner Darryl R. Wold and Chairman David M. Mason's forthcoming Statement of Reasons in MUR 4994 (discussing the deficiencies of the complaint with respect to these entities).